Supreme Court, U.S.
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No. 92-150

In The

Supreme Court of the United States

October Term, 1992

DEAN H. CALHOON, as Commissioner of the Department of Labor for the State of Oklahoma; and THE DEPARTMENT OF LABOR FOR THE STATE OF OKLAHOMA,

Petitioners,

-against-

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, as held by the Tenth Circuit, the *Employee Retirement Income Security Act* preempts the action of a State Commissioner of Labor in requiring the restructuring of a nationwide, collectively bargained, multi-employer, trusteed educational program for employees into an apprenticeship program as a prerequisite for paying certain employees at the wage rate established for such employees pursuant to the terms of a nationwide, multi-employer collective bargaining agreement.[1]

Respondent National Elevator Industry, Inc., respectfully submits that, as shown by the decision of the Tenth Circuit, the question presented should be answered in the affirmative based upon the prior decisions of this Court, and this Court should therefore deny the petition for a writ of certiorari.

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[1] In the Court below, National Elevator Industry, Inc. argued that the action of the Oklahoma State Commissioner of Labor was also preempted by the *National Labor Relations Act* ("NLRA"). The Court below declined to address the preemption question related to the NLRA because the Court below found ERISA preemption. (Appendix, 30) Accordingly, the NLRA preemption question is not ripe for consideration by this Court.

PARTIES TO THE PROCEEDINGS

The Respondent is National Elevator Industry, Inc. (hereinafter called "NEII").

NEII is a non-profit membership corporation organized under the Membership Corporation Law of the State of New York.

NEII represents employers engaged in the business of constructing, modernizing, repairing and servicing elevators, escalators, moving walkways and similar devices for third-party customers such as general construction contractors, building owners and building agents in every State of the United States.

One of NEII's principal purposes is to negotiate and administer a nationwide collective bargaining agreement which governs the wages, hours and working conditions of the elevator constructor mechanics and helpers employed by the employers that are members of NEII at building construction sites and at existing buildings in every State of the United States. For over seventy years, NEII and its predecessors have negotiated a series of five-year nationwide collective bargaining agreements with the International Union of Elevator Constructors (hereinafter called the "IUEC").

NEII has no parent or subsidiary corporation. However, consonant with Supreme Court Rule 29.1, the names and cities of the principal offices of the business

organizations which NEII represents as either a general or special NEII member are listed in the footnote.[2]

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[2] Armor Elevator, Co., Louisville, Kentucky; Bay State Elevator Co., Inc., Springfield, Massachusetts; Capital Elevator Service Co., Columbus, Ohio; Carter Elevator Company, Inc., Sioux Falls, South Dakota; Courion Industries, Inc., St. Louis, Missouri; Dover Elevator Corp., Memphis, Tennessee; Eastern Elevator Company, Inc., New Haven, Connecticut; Elevator Sales & Service, Inc., Dalton, Massachusetts; Elevators, Inc., Columbus, Ohio; ESCO Elevators, Inc., Fort Worth, Texas; Futjitec America, Inc., Lebanon, Ohio; Gallagher Elevator Company, Inc., Buffalo, New York; General Elevator Company, Inc., Baltimore, Maryland; Hollister Whitney Elevator Corp., Quincy, Illinois; Independent Elevator Company, Kalamazoo, Michigan; Liberty Elevator Corporation, Paterson, New Jersey; Marshall Elevator Company, Pittsburgh, Pennsylvania; Midstate Elevator Company, Syracuse, New York; Millar Elevator Service Co., Holland, Ohio; Montgomery Elevator Company, Moline, Illinois; O'Keefe Elevator Company, Inc., Omaha, Nebraska; Otis Elevator Company, Farmington, Connecticut; F. S. Payne Company, Cambridge, Massachusetts; Powers Elevator Company, Lexington, Kentucky; Schnidler Elevator Corp., Morristown, New Jersey; Schumacher Elevator Company, Denver, Iowa; Seelar Elevator, Inc., Erie, Pennsylvania; Serge Elevator Company, Woodridge, New Jersey.

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No. 92 - 150

In The

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Petitioners,

-against-

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COUNTERSTATEMENT OF THE CASE

At any given time, there are hundreds, sometimes thousands, of job sites throughout the United States at which elevator constructor mechanics ("mechanics") and el-

evator constructor helpers ("helpers") work in "teams," installing new elevators in a building under construction. Elevator constructor work has been performed by such "teams" in this manner for a least seventy years. Elevator mechanics and helpers also work in "teams" in repairing and modernizing elevators in existing buildings.

The wages, hours and working conditions of virtually all of the mechanics and helpers performing this work on a nationwide basis, including the State of Oklahoma, are determined pursuant to a nationwide collective bargaining agreement negotiated by the International Union Elevator Constructors ("IUEC") and National Elevator Industry, Inc. ("NEII"). For more than seventy years these collective bargaining agreements have provided that elevator construction, repair and modernization work is to be performed by a "team" (or "teams"), each such "team" consisting of one mechanic and one helper. It is undisputed that virtually all such elevator work performed throughout the United States, including such work in the State of Oklahoma, is actually performed by such teams pursuant to the nationwide collective bargaining agreement.

Prior to 1967, the system for training helpers in the skills needed for advancement to the position of mechanic in the elevator industry operated on a city by city basis. These locally operated training systems were unsatisfactory to both NEII and the IUEC for several reasons, including the fact that the quality and type of training provided to helpers was not uniform from city to city and, because the use of sophisticated electronic controls was rapidly evolving in the elevator industry, a more professional approach was needed to train helpers.

In collective bargaining in 1967, NEII and the IUEC agreed to establish a nationwide educational program known as the National Elevator Industry Educational Program ("NEIEP"). NEIEP is commonly known as a "Taft-Hartley Trust," that is, a trust organized pursuant to the *Labor-Management Relations Act*, 29 U.S.C. § 302. As such, NEIEP is governed by a board of trustees, one half of whom are appointed by NEII and the other half of whom are appointed by the IUEC.

As the Tenth Circuit found, it is undisputed that NEIEP is also an employee benefit plan within the meaning of the *Employee Retirement Income Security Act*, 29 U.S.C. § 1001, *et seq.* ("ERISA"). (Appendix, pp. 8, 9)

From its beginning, NEIEP has sought to achieve, and has achieved, a high level of excellence in the educational programs it makes available to helpers employed by contributing employers in the elevator industry. The record in the courts below contains substantial documentary evidence concerning NEIEP. In summary, NEIEP is well funded, based upon employer contributions for every hour of work in the elevator industry on a nationwide basis. NEIEP is available to every helper employed by a contributing employer in the elevator industry without the payment of any tuition by the helper. NEIEP has its principal office in North Attleboro, Massachusetts but hires instructors to conduct classes on a regular on-going basis in more than 71 cities throughout the United States, including Tulsa and Oklahoma City. NEIEP has a home study program for helpers who may find it inconvenient to attend classes. NEIEP furnishes high quality books and manuals

to the helpers enrolled in NEIEP and provides other training aids such as high quality video instructional tapes and experimental electronic labs. The NEIEP office in North Attleboro has toll-free telephone lines by means of which helpers can talk directly to instructors as often as the helpers wish to do so. NEIEP enrolls helpers in a course of study which ordinarily requires three or four years to complete but which is flexible and permits a helper to complete his or her studies in a longer or shorter period of time. NEIEP provides for a uniform level of excellence of instruction on a nationwide basis by carefully monitoring the performance of the instructors who conduct the classes throughout the United States. NEIEP provides for complete portability of educational credits on a nationwide basis. Both of these latter features are important to the elevator industry where employees are not infrequently sent to job sites far removed from their home cities. NEIEP conducts its examinations under stringently monitored conditions, and is in compliance with all laws relating to equal employment opportunities for all helpers regardless of race, color, creed, national origin, sex, age or other arbitrary considerations unrelated to the competence and ability of helpers to perform work.

Although NEIEP is an educational program, NEIEP is *not* an apprenticeship program and does *not purport* to be an apprenticeship program, which is typically controlled at a local level and subject to the abuses of nepotism and haphazard instructional and testing procedures. Apprenticeship programs are also typically characterized by inflexible schedules for completion of the apprenticeship, in contrast to NEIEP, which permits a helper to learn at the pace

best suited for the helper.

Most elevator work is performed for private, non-governmental, parties such as general contractors, building owners or building agents. However, some of the work is performed by elevator companies for the federal government and some of the work is performed by elevator companies for the various States or political subdivisions thereof.

Under the nationwide collective bargaining agreement, the wage rates for mechanics and helpers in different geographic areas change from time to time, approximately once a year. As part of the regular routine, NEII gathers information concerning the current wage rates and hourly employee benefit costs for other unionized trades in each such geographic area. NEII then uses this information to calculate the new wage rates for elevator constructor mechanics and elevator constructor helpers employed in the same geographic area pursuant to the wage rate formula set forth in the nationwide collective bargaining agreement. NEII then notifies several interested parties of the new wage rates. Among others, NEII sends the notification to the local IUEC Union, the employers doing business in that locality, and the United States Department of Labor. The United States Department of Labor uses the information to publish in the Federal Register the new prevailing wage rates under the *Davis-Bacon Act*, 40 U.S.C. § 276(a) *et seq.* for elevator constructor mechanics and helpers in each geographic area. The United States Department of Labor has recognized the category of elevator constructor helper as a legitimate employee classification for more than 50 years. Under the *Davis-Bacon Act*,

any employer performing elevator work for the federal government must pay its elevator constructor helpers at the wage rate for such helpers, as published in the Federal Register for the geographic area in which the work is to be performed.

Most States, such as Oklahoma, have passed State prevailing wage rate laws which are similar to the *Davis-Bacon Act*. The Oklahoma prevailing wage rate law reads, in part, as follows:

> "The prevailing hourly rate of wages for this State shall be those filed in the Federal Register as determined by the U.S. Department of Labor, pursuant to the Federal Davis-Bacon Act and amendments thereto."

Okla. Stat. Title 40, § 196.6 (1991).

Sometime in early 1989, the Oklahoma Commissioner of Labor conducted audits of the payrolls of several elevator companies that had performed elevator work for Oklahoma. These audits showed that the elevator companies had paid their helpers at the wage rate for helpers which was determined pursuant to the nationwide collective bargaining agreement for the geographic area in Oklahoma and for the time in which the work was performed. The Commissioner, however, took the position that this was inadequate and that the elevator companies were required to pay helpers employed on a job performed for the State of Oklahoma at the wage rate for mechanics, rather than at the wage rate for helpers as established by the nationwide collective bargaining agreement. The Commissioner threatened, *inter alia,* to debar these companies from

bidding upon future work for Oklahoma unless the companies made immediate retroactive payments to helpers at the mechanic's wage rate. Under this threat, the elevator companies complied with the Commissioner's demand. Shortly thereafter, NEII filed with the Commissioner a petition for a declaratory ruling that the proper wage rate for helpers employed on a job performed for the State of Oklahoma was the wage rate for helpers established by the nationwide collective bargaining agreement between NEII and the IUEC for the time and for the geographic area in which the work is performed.

The Commissioner's ruling upon NEII's petition for a declaratory ruling is reprinted in the Appendix at pages 46 through 56. As relevant to the present case, the Commissioner ruled, in substance, that the Commissioner would "recognize" the elevator constructor helper only if NEIEP were reorganized in the form of an apprenticeship program.

NEII then commenced an action in the United States District Court for the Western District of Oklahoma, seeking, *inter alia*, to have the District Court vacate the Commissioner's ruling on the basis that the ruling was preempted by ERISA and the NLRA. The Commissioner moved for dismissal of NEII's complaint, which motion the District Court granted. The order of the District Court is reprinted in the Appendix at pages 31 through 45.

NEII then appealed from that portion of the decision of the District Court which held that the Commissioner's ruling was not preempted by either ERISA or the NLRA. The United States Court of Appeals for the

Tenth Circuit reversed the order of the District Court, holding that the Commissioner's ruling was preempted by ERISA. Because the Tenth Circuit found ERISA preemption, the Tenth Circuit declined to address the issue of NLRA preemption. The decision of the Court of Appeals for the Tenth Circuit is reported at 957 F.2d 1555, (10th Cir. 1992), and is reprinted in the Appendix at pages 1 through 30.

ARGUMENT

I

There Is No Conflict Between The Ninth And Tenth Circuit Courts of Appeals As Contended By Petitioners.

Petitioners contend that this Court should grant a writ of certiorari to resolve a purported conflict between the decision of the Court of Appeals for the Ninth Circuit in *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert denied*, _____ U.S. _____, 112 S.Ct. 863 (1992) and the decision of the Court of Appeals for the Tenth Circuit in the present case. There is no such conflict.

First and foremost, the *MacDonald* case was cited by the Tenth Circuit as one of the precedents supporting the decision of the Tenth Circuit, as follows:

> In a second Ninth Circuit case, *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), the court considered application of Nevada statutes that allowed apprenticeship/training wages to be paid only to workers in state approved apprenticeship programs. The plaintiff had a BAT approved ERISA apprenticeship program but was required to pay the regular prevailing wage to apprentices because their plan was not approved by the state. The Ninth Circuit found this application of the Nevada prevailing wage statutes to be preempted by ERISA. *Id* at 275.

> *MacDonald* resembles the instant case because both cases involve states requiring higher wages for workers in ERISA training programs they do not approve of while allowing lower wages for workers in ERISA training programs of which they do approve.

National Elevator Industry, Inc. v. Calhoon, et al., 957 F.2d 1555 at 1559, reprinted at Appendix, pp. 16, 17.

> All the above cases dealt with apprenticeship/training programs or wages or both, and all found preemption. Although the facts of the case before us differ in some specifics from these other cases, the principles articulated do support preemption in the present case. Although wage regulation is an area of traditional state regulation, when wage regulations uniquely affect ERISA plans and involve the state in imposing requirements upon such plans, preemption will be found.

National Elevator Industry, Inc. v. Calhoon, et al., supra, at 1560, reprinted at Appendix, p. 21.

Based upon the foregoing, it is clear that the Tenth Circuit certainly did not read the decision by the Ninth Circuit in *MacDonald, supra,* as a decision in conflict with its decision in the present case. On the contrary, the Tenth Circuit clearly regarded the "principles articulated" by the Ninth Circuit in *MacDonald, supra,* and by the Second and Eighth Circuits in other cases,[3] to "support

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[3] *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local*

preemption in the present case."

In an effort to create the appearance of a conflict, Petitioners attempt to twist the meaning of the Ninth Circuit's decision in *MacDonald, supra,* by a highly selective presentation of quotations from the decision. Petitioners quote the first sentence of a two-sentence paragraph from the *MacDonald* decision, omitting the second sentence which should obviously be read in context with the first sentence, and which is more directly relevant to the issues in the present case than the first sentence. (Petitioners' Brief, p. 25) Thus, in the paragraph partially quoted by Petitioners, the Ninth Circuit noted:

> There is no exemption from the broad preemption provision of section 514(a) of ERISA except for the federal Fitzgerald Act and the regulations issued thereunder. 29 U.S.C. § 1144. *Thus, any state regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by section 514(a) of ERISA. Id.*

MacDonald, supra, at 274. Emphasis supplied.

Section 50 of the *National Apprenticeship Act* (popularly known as the *Fitzgerald Act,* 29 U.S.C. § 50),

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Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 72 (1990); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *Boise Casade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied, sub. nom., Lemmes v. Boise Cascade Corp.*, ___ U.S. ___, 112 S.Ct. 863 (1992).

reads, in its entirety, as follows:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. For the purposes of this Chapter, the term "State" shall include the District of Columbia.

In Section III of its decision in the present case, the Tenth Circuit carefully addressed the Petitioners' argument that the general savings clause in ERISA, 29 U.S.C. § 1144(d), saves the ruling of the Oklahoma Commissioner from preemption. The Tenth Circuit rejected the Petitioners' argument that the Commissioner was acting pursuant to powers delegated to him under the *Fitzgerald Act*, 29 U.S.C. § 50. Again, in this section of its opinion dealing with the general savings clause in ERISA, the Tenth Circuit expressly cited the Ninth Circuit's decision in *MacDonald* as a precedent supporting its decision. The decision of the Tenth Circuit reads, in part, as follows:

> Section 50 does not depend upon states to enforce its provisions; in fact,

> there is nothing in § 50 for states to enforce, (Footnote omitted.) Section 50 merely seeks to facilitate development of apprenticeship programs - - it does not mandate apprenticeship programs or seek to discourage other training programs (Footnote quoted below.) *We agree with the Ninth Circuit that* "the regulations relate only to eligibility for federal registration. Neither they nor the Act [§ 50] itself contemplate enforcement mechanisms...." *Hydrostorage,* 891 F.2d at 731 (citing and adopting the district court's analysis, 685 F. Supp. 718, 722 (N.D. Cal. 1988); *see also MacDonald,* 949 F.2d at 274 n.3 (ERISA "does not permit independent state regulation" under § 50). Therefore, defendants' ruling simply cannot be said to function as an enforcement mechanism for § 50. We decline to make § 1144(d) into an expansive savings clause; we hold that the savings clause of § 1144(d) does not save the defendants' ruling from ERISA preemption. *See Hydrostorage,* 891 F.2d at 731-32 (state law encouraging apprenticeship programs not saved from ERISA preemption by § 1144(d)); *MacDonald,* 949 F.2d at 275 (wage law favoring state apprenticeship programs not saved from ERISA preemption).

National Elevator Industry, Inc. v. Calhoon, et. al., supra, at 1562 reprinted at Appendix, pp. 27, 28, 29, emphasis supplied.

The footnote to the first sentence quoted above

sets forth the text of 29 U.S.C. § 50. The footnote to the second sentence reads as follows:

> The federal government does not discourage the NEIEP with a prohibitive wage structure as defendants seek to do. The U.S. Department of Labor recognizes the helper category and allows the lower wage rate for helpers on federal public works projects in Oklahoma. *See* United States Dep't of Labor, General Wage Decision No. OK88-18.

National Elevator Industry, Inc. v. Calhoon, *supra*, at 1562, reprinted at Appendix, p. 28.

Thus, the Tenth Circuit clearly found that the Oklahoma Commissioner of Labor was not acting pursuant to any power delegated to him by the *Fitzgerald Act*, notwithstanding his claim to the contrary. In *MacDonald*, the Ninth Circuit found that, notwithstanding his claim to the contrary, the Nevada Commissioner of Labor was not acting pursuant to any power delegated to him pursuant to the *Fitzgerald Act*. *MacDonald*, *supra*, at 274. As noted by both the Ninth and Tenth Circuits, nothing contained in the *Fitzgerald Act* mandates the establishment of an apprenticeship program under any circumstances. As noted by both the Ninth and Tenth Circuits, the *only* power delegated by the *Fitzgerald Act* to the states is the power to determine whether an apprenticeship program which seeks governmental approval as an apprenticeship program meets the standards required for such approval under the federal regulations issued pursuant to the *Fitzgerald Act*.

In the instant case, NEIEP is *not* an apprentice-

ship program, does *not purport* to be an apprenticeship program, and is *not seeking* certification by either the United States Department of Labor or the State of Oklahoma as an apprenticeship program. NEIEP is a multi-employer educational program established through nationwide collective bargaining between NEII and the IUEC for employees in the elevator industry. NEIEP is administered by a board of Trustees appointed by NEII and the IUEC pursuant to Section 302 of the *Labor Management Relations Act*, 29 U.S.C. § 302. As noted by the Tenth Circuit, it is undisputed that NEIEP is an "employee benefit plan" within the meaning of ERISA, Section 1002(1), (Appendix, p. 8).

The record before the Commissioner, which is part of the record in the Courts below, contains a full description of NEIEP. The Oklahoma Commissioner of Labor has never in any way disputed NEII's claim that the education which NEIEP affords to helpers in the elevator industry is at least the equal of, and in most respects far superior to, the education afforded to apprentices in other industries by locally controlled apprenticeship committees. The *only* objection expressed by the Oklahoma Commissioner is to *form* of NEIEP, that is, the Commissioner objects to the fact the NEIEP is not structured as an apprenticeship program (which is typically controlled at a local level, rather than operated on a nationwide basis).

As shown above, the Tenth Circuit correctly held that the *Fitzgerald Act* does not delegate any power to the Oklahoma State Commissioner to compel any modification of NEIEP so that it is converted to an apprenticeship program. While the *Fitzgerald Act* generally encourages the

establishment of apprenticeship programs, as noted by the Tenth Circuit, there is nothing in the *Fitzgerald Act* which is intended to discourage other types of educational programs such as NEIEP.

In summary, there is nothing in *McDonald, supra*, which is in conflict with the rationale or the result in the instant case. In *McDonald*, the Nevada Commissioner of Labor refused to "recognize" an appreticeship program which had already received federal approval by the United States Department of Labor. The action of the Oklahoma Commissioner of Labor in the instant case mirrors the action of the Nevada Commissioner in *McDonald* in that both Commissioners required "higher wages for workers in ERISA training programs which they do not approve of while allowing lower wages for workers in ERISA training programs that they do approve of." *National Elevator Industry, Inc. v. Calhoon, supra*, at 1560.

The Petitioners herein seek to create the appearance of a conflict by arguing, in effect, that *McDonald* stands only for the proposition that action taken by a state commissioner acting pursuant to power delegated to the commissioner under the *Fitzgerald Act* would not be preempted by ERISA because ERISA does not preempt other federal laws or state action "upon which federal laws depend for their enforcement," within the meaning of *Shaw v. Delta Airlines*, 465 U.S. at 104.

As shown above, neither the instant case nor the *McDonald* decision involves any state action upon which the *Fitzgerald Act* depends for enforcement.

II

The Petitioners' Contention That The Commissioner Was Seeking To Further The Federal Policies Underlying The Fitzgerald Act Is A Post Hoc Rationalization By Petitioners' Counsel.

All of the foregoing argument concerning the applicability of the *Fitzgerald Act* is far removed from the realities underlying the Oklahoma Commissioner's actions in the instant case. The contention that the Oklahoma Commissioner was seeking to further the federal policies embodied in the *Fitzgerald Act* is strictly the *post hoc* rationalization of the Petitioners' counsel to attempt to clothe the Commissioner's action with some legitimate purpose. The *Fitzgerald Act* was never mentioned by the Oklahoma Commissioner in his response to NEII's request for a declaratory ruling. (Appendix, pp. 46 through 56). Further, the State of Oklahoma has shown so little interest in the encouragement of apprenticeship programs that, at least up to the date of oral argument before the Tenth Circuit, the State of Oklahoma had not even registered under the regulations issued pursuant to the *Fitzgerald Act* as a state authorized to approve the qualifications of apprenticeship programs that seek certification under the *Fitzgerald Act*, 29 C.F.R. § 29.12(a), reprinted in part at Appendix p. 73.

Counsel's *post hoc* rationalization aside, the Oklahoma Commissioner chose to ignore the long history of collective bargaining in the elevator industry relating to the employment of helpers in "teams" with mechanics simply because there is a prejudice against the employment of helpers in the construction industry. It is respectfully sub-

mitted that the Oklahoma Commissioner demanded the restructuring of NEIEP into an apprenticeship program solely to create an obstacle to the employment of helpers in the elevator industry, the Commissioner fully expecting that it would not be feasible or desirable for NEII to disrupt a nationwide educational plan to carve out a different kind of educational program for Oklahoma. The Commissioner's actions run directly counter to the national policy embodied in ERISA to protect employee benefit plans from "the threat of conflicting and inconsistent State and local regulations." (Remarks of Representative Dent with respect to the broad scope of ERISA preemption, 120 Cong. Rec. 29197 (1974), quoted by this Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 at 98 (1983)).

The Oklahoma Commissioner was clearly willing to sacrifice the substantial benefits to helpers of a nationwide, collectively bargained, trusteed, high quality employee benefit plan to appease certain elements of his constituency in Oklahoma, but his actions were, as found by the Tenth Circuit, preempted by ERISA.[4]

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[4] The Commissioner's ruling also adversely affects the interests of the State of Oklahoma. The bids for elevator construction work are based in significant part upon the bidder's estimate of labor costs. NEII advised the Commissioner in writing in NEII's request for a declaratory ruling that prohibiting the use of helpers in "teams" with mechanics would result in additional costs to the State of Oklahoma in the range of 17% to 33% higher than the costs to a private party or to the federal government *for exactly the same work in the State of Oklahoma*. If upheld, the Commissioner's ruling, purportedly construing the Oklahoma *Prevailing Wage Rate* law,

III

Petitioners' Brief Misstates NEII's Argument In The Courts Below.

At page 23 of their Brief, footnote 1, Petitioners incorrectly state that "throughout this proceeding, NEII has argued that, under *Shaw*,[5] the fact that the United States Department of Labor has recognized the lower helper wage rate in federal public works projects requires states to do so as well." NEII never made this argument in the lower courts and disavows any such argument in this Court.

NEII does not believe that Petitioners' misstatement of NEII's argument is crucial to the Court's consideration of the petition because the decision of the Tenth Circuit speaks for itself. NEII merely calls the Court's attention to Petitioners' misstatement pursuant to Rule 15.1 of the Rules of the Supreme Court.

Petitioners have not specified the basis for its misstatement and NEII knows of no such basis.

In the Courts below, NEII made only one statement concerning the Commissioner's legal compulsion to

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would cause the State of Oklahoma to pay in the range of 17% to 33% more than the amount which would be paid by a private party or the federal government *for the same work in Oklahoma.* Such a bizarre result, which is in irreconcilable conflict with the most fundamental aim of a *prevailing wage rate* law, strongly suggests that the Commissioner had some other agenda uppermost in mind in making his ruling.

[5] *Shaw v. Delta Airlines,* 463 U.S. 85 (1983).

recognize the wage rate for an elevator constructor helper. NEII argued that, *under Oklahoma law*,[6] the Commissioner should have found the prevailing wage rate for an elevator constructor helper to be the wage rate for an elevator constructor helper as published in the Federal Register.

In the Court below, NEII also contrasted the Petitioners' claim that the Commissioner was merely seeking to foster the federal policies embodied in the *Fitzgerald Act* with the fact that the Commissioner's ruling was totally inconsistent with the long standing recognition of the category of helper by the United States Department of Labor. Pointing out this glaring inconsistency in the State's position is hardly an argument that federal law, as interpreted by this Court in *Shaw*, requires the states to recognize the category of elevator constructor helpers.

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[6] Title 40, Oklahoma Statutes, § 196.6, provides, in relevant part, that "the prevailing hourly rate of wages for this state shall be those filed in the Federal Register as determined by the U.S. Department of Labor, pursuant to the Federal Davis-Bacon Act and amendments thereto."

IV

There Is No Policy Reason For Granting The Petition For A Writ Of Certiorari.

In reaching its decision in the instant case, the Tenth Circuit relied upon the principles articulated in four decisions issued by the Second, Eighth and Ninth Circuit Courts of Appeals, each of which involved ERISA preemption of various state actions purportedly based upon a State's prevailing wage rate law. The Supreme Court has denied a writ of certiorari in each of these cases. *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, _____ U.S. _____, 111 S.Ct. 72 (1990); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *Boise Cascade Corp. v. Paterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied, sub nom., Lemmes v. Boise Cascade Corp.*, _____ U.S. _____, 112 S.Ct. 863 (1992); *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir 1991), *cert. denied*. _____ U.S. _____, 112 S.Ct. 2991 (1992).

Including the decision of the Tenth Circuit in the instant case, four Circuit Courts have now reached consistent results in five cases involving the interplay of ERISA preemption and the actions of State officials purportedly acting under the authority of State prevailing wage rate laws and/or the *Fitzgerald Act*. More importantly, the results in these five cases have been based upon the same general rationale in applying the decisions of this

Court to the slightly differing sets of facts in each case involving the State prevailing wage rate laws. Under these circumstances, it seems clear that the many prior decisions of this Court relating to ERISA preemption in other contexts[7] have been more than sufficient to guide the Courts of Appeals in deciding ERISA preemption questions in the context of State prevailing wage rate statutes.

In the instant case, the Tenth Circuit identified the most difficult issue as the issue whether the Commissioner's ruling "relates to" NEIEP. *National Elevator Industry, Inc. v. Calhoon, et. al., supra,* at 1558, Appendix p. 10. After a careful review of the legal standards to be applied by the Courts in determining whether a State law or State action "relates to" an ERISA plan, the Tenth Circuit concluded that the ruling of the Oklahoma Commissioner herein did in fact "relate to" NEIEP because the Commissioner's re-

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[7] *Ingersoll-Rand Co. v. McClendon*, _____ U.S. _____, 111 S.Ct. 478 (1990); *FMC Corp. v. Holliday*, _____ U.S. _____, 111 S. Ct. 403 (1990); *Massachusetts v. Morash*, 490 U.S. 107, (1989); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988); *Fort Halifax Packing Co., Inc. v. Coyne, Director, Bureau of Labor Standards of Maine*, 482 U.S. 1 (1987); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 471 U.S. 724 (1985); *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491 (1984); *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 904 (1981); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

quirement that NEIEP be restructured as an apprenticeship plan as a condition to "recognition" of the elevator helper "uniquely affected" NEIEP and was not "tenuous, remote or peripheral". *National Elevator Industry, Inc. v. Calhoon, et. al., supra,* at 1560; Appendix, p. 21. The clarity and thoroughness of the Tenth Circuit's opinion on this point speaks volumes concerning the lack of necessity for this Court to issue a writ of certiorari.

CONCLUSION

For The Reasons Set Forth Above, The Court Should Deny The Petition For A Writ Of Certiorari.

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September 24, 1992

Respectfully submitted,

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